

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

WAL-MART STORES, INC.

Employer

and

Case 21-RC-20301

UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION, LOCAL 1167,
AFL-CIO, CLC

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute an appropriate unit for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act.

All full-time and regular part-time employees employed in the Tire and Lube Express department (Departments 10 and 37), including the department manager, support manager, service manager, department greeter, automotive service technicians, courtesy technicians, lower back bay technicians, upper bay technicians, tire technicians, sales associates and stocker at the Employer's facility located at 31700 Grape Street, Elsinore, California; excluding all other employees, guards and supervisors as defined in the Act.

The Petitioner seeks a unit composed of all full-time and regular part-time employees employed in the Tire and Lube Express department (Departments 10 and 37), including the department manager, support manager, service manager, department greeter, automotive service technicians, courtesy technicians, lower back bay technicians, upper bay technicians, tire technicians, sales associates and stocker, at the Employer's facility located at 31700 Grape Street, Elsinore, California; excluding all other employees, guards and supervisors as defined in the Act. There are 18 employees in the petitioned-for unit.

The Employer contends that the unit sought by the Petitioner is inappropriate, and that the only appropriate unit is a wall-to-wall unit including all hourly employees at the store. A wall-to-wall unit would include approximately 250 employees. Further, the Employer alleges that Tire and Lube Express Department Manager John Humphrey is a supervisor within the meaning of Section 2(11) of the Act and that he should therefore be excluded from the unit.

The record reveals that there is no history of collective-bargaining among any of the Employer's Elsinore store employees.

The Employer is a Delaware corporation engaged in the operation of retail stores throughout the United States. The Employer operates both regular apparel and hardlines merchandising

stores, and Super Stores (which include a grocery center). The only facility involved herein is the Employer's store located at 31700 Grape Street, Elsinore, California, (herein the store), which is a regular apparel and hardlines store. This store is separated into six divisions, and each division is further subdivided into 33 departments. The six divisions are general merchandising, jewelry, pharmacy, shoes, 1-hour photo and tire and lube express. The tire and lube express division is hereinafter called the TLE division.

Store Manager Tracy Elnorris O'Neal, herein called O'Neal, is responsible for the overall operation of the store, including final authority on hiring and firing decisions in the store. Reporting directly to O'Neal are two hardlines assistant managers, one homelines assistant manager, one softline assistant manager, two night assistant managers, one 1-hour photo manager, one TLE manager and one pharmacy manager.

O'Neal spends approximately 1 to 1½ hours of his day overseeing the operations in the TLE division. Specifically, he walks through this area at various times throughout the day and speaks to sales associates, checks to see that all advertising signage is correct, assists customers and insures that overall compliance with store policies are being observed.

The TLE Division:

The TLE division is divided into two departments: department 10 and department 37. Department 10 encompasses the retail aspect of the TLE division, which involves the sale of automotive parts. Department 37 is responsible for providing automotive services to customers.

Department 10 is located inside of the store, between the sporting goods, hardware and crafts and fabrics departments.

Department 37 is located away from the other retail departments of the store, but contiguous with department 10. There is a door separating Department 37 (TLE service area) from the rest of the store. This door is located between the service area and department 10. Customers may enter the TLE service area either through the inside of the store, where they would pass through department 10, or through the back of the store where there is a separate entrance into the TLE service area.

In the TLE service area, there is a desk for customers to either purchase merchandise or to request service for their vehicles. In this same area, there is a waiting room for customers furnished with chairs and couches. However, customers often shop in other parts of the store while they are waiting for service on their vehicle to be completed.

The composition of the TLE division associate personnel is as follows: Department 10 is comprised of two cashiers, two stockers and the two support managers and one department manager. Department 37 has one greeter and approximately 11 service technicians who are directly supervised by the one service manager.

The TLE greeter is responsible for checking in the orders that a service technician will perform, and for driving vehicles into the service area. The service technicians are responsible for oil and filter changes, flat-tire changes, and vacuuming vehicles. Within the service technician classifications, there is an upper bay technician and a lower bay technician. An upper bay technician is the person who performs work at the service area level and who is responsible for

checking pressure and putting the oil into the vehicle. The lower bay technician is underneath the vehicle, performing service on the vehicle including changing the oil and filter. The service manager is responsible for selecting which technicians service which orders.

The sales associates in department 10 ring up transactions on the registers, assist customers, and replenish items on the sales floor of their department.

In addition, they frequently write service orders for department 37.

TLE associates are not required to have automotive experience or external certifications to work in either department 10 or department 37. However, the record reveals that some service technicians have certifications allowing them to perform certain services on vehicles.¹

The tools used by the service technicians in their daily tasks include oil dispensing guns, pneumatic grease guns, car lifts, and air drivers. None of the other divisions within the store utilize this type of equipment.

TLE service technicians wear dark blue pants and dark blue shirts with the TLE logo printed on the shirts. In addition, the service technicians use protective gear that the Employer's other associates are not required to wear. In this regard, service technicians who work in the "pit" wear hard-hats.² Technicians also wear a "burn-sleeve," which is a sleeve that fits over their arm for the purpose of protecting them from high temperature fumes emanating from the vehicles.

¹ The record did not specify what types of certifications nor what services they allow technicians to perform.

² The record does not describe in detail what the "pit" is, only that it is an area where associates work.

In addition to the sales associates noted above, the TLE Division is also staffed with one division manager, one department manager, one service manager and two support managers.³

The Employer also utilizes a "store within store" (SWAS) concept in which certain divisions in the store receive a weekly report from management personnel outside of the store's management structure. This report notifies the divisions of high and low selling products and how to merchandise these products. The TLE division employs this SWAS concept. In this regard, apart from reporting to the store manager, the TLE division manager reports to a TLE district manager, who in turn reports to a TLE regional manager. The TLE district manager and TLE regional manager are not stationed in the store. However, the district manager visits the store on a weekly basis.

The hours of operation for department 37 are Monday through Saturday, 8:00 a.m. to 9:00 p.m. and Sundays, 8:00 a.m. to 8:00 p.m. These hours differ from the rest of the store, which is open from 8:00 a.m. to 10:00 p.m. or 11:00 p.m. Department 10 has the same hours as the rest of the Store, however its cash registers close approximately 1 hour before the rest of the store's registers.

The Employer requires that service technicians undergo on-the-job training different from all of the other associates in the store. This training includes instructions on how to change the filter and oil on a vehicle and how to perform pressure checks.

The record reveals that the wages earned by the

³ During the hearing, the parties stipulated that TLE Service Manager Robert Kinnee and Support Managers Sandra Terry and Thomas Meden are not supervisors within the meaning of Section 2(11) of the Act. Based on the parties' stipulation, Kinnee, Terry, and Meden are included in the appropriate unit.

employees in the TLE division are comparable to each other. All of the associates in this division, excluding the TLE division manager, are hourly employees. Their wages range from \$7.02 to \$11.35 per hour.

The TLE registers differ from the other registers in the store in that they are the only ones that operate a "Bay Support" system (a computerized system which tracks prior automotive services performed on customer vehicles).

The record discloses that the TLE division has its own storeroom, separate from the storeroom that is utilized by the other divisions within the store. However, TLE products may be stored in the store's main storeroom, when the TLE stockroom is filled to capacity. With respect to shipment of products, some items come in specifically for the TLE division, such as car batteries, bulk oil, and bulk-order tires.

The TLE service area has a separate clean-up room/restroom. It is located in the hallway off of the service area. This clean-up room is used by the service technicians and is also the area where uniforms are left for laundering. In this regard, the store utilizes a laundry service for the technicians' and greeters' uniforms.⁴

The TLE division also has a separate telephone number from that of the main store, which is listed in the phone directory. It is utilized so that customers can directly call the service area.

The record reveals that the service technicians in the TLE division primarily work in the service area. On those rare instances when they work elsewhere, the service technician help to stock items for department 10. The service technicians generally do not provide support for other divisions of the

⁴ The record reveals that the Employer also utilizes this laundry service for the uniforms of the security guards.

store. The one example disclosed in the record where they do provide support is where a service technician works with a cart associate in the assembly of a tire promotion, which occurs about twice a year.

Since the filing of the petition, the store has transferred two employees into department 37 of the TLE division. Apart from these transfers, there has been only one other transfer into the TLE division in the past couple of years.⁵ The record reveals that there have been no transfers from the TLE division into other areas of the store.

The Store's Operation:

All associates are subject to the same hiring process whereby they are required to submit the same employment applications; meet with a screening committee; complete an "Orion Survey"⁶; meet with a second interviewer; and finally meet with the store manager for a final

interview. All store associates are also subject to the same orientation process once they are hired.

The record also reveals that all associates utilize the same employee handbook and receive the same "Computer Based Learning" (CBL) system training concerning general storewide policies. This training is administered in the store's training room during new employee orientation.

All associates are invited, although not

⁵ Department 10 cashier Debbie Cometto was transferred last year from the courtesy counter to the TLE division.

⁶ The Orion survey is a character test that the Employer utilizes during its hiring process. It consists of 50 pre-drafted questions.

required, to attend daily store meetings in which weekly sales store policies and procedures and sales plans are discussed. These meetings are held in different areas of the store each day and employees who are available at the time attend the meetings.

The store's retail associates are required to wear vests. The garden center associates wear green vests, the hardlines associates wear blue vests, the sporting goods associates wear brown/beige vests and all other associates, including the TLE retail associates wear red vests.

All associates punch the same time clock and have access to the same breakroom.⁷ All associates are paid bi-weekly and collect their paychecks from the training room. In addition, all associates utilize the same employee parking area. They all have access to lockers, which are assigned to them by the personnel manager.⁸ The lockers are located next to the training room in the corridor outside of the associate lounge. All associate lockers are in this area.

All associates are required to observe the Employer's "Ten Foot" customer service regulation. This directs employees to greet and assist customers who come within 10 feet of them, and subsequently escort them to the area where the products they are seeking are located. Every associate, including TLE

⁷ Associates are not required, nor do they always, utilize this breakroom.

⁸ The record does not disclose whether these lockers are assigned upon request or whether they are automatically issued.

division employees, are required to follow this rule regardless of what department they happen to be in at the time they encounter a customer.

The store has an "open door" grievance policy for all associates. If an associate has a problem, they may go to their immediate supervisor to discuss that problem.

If the issue is not resolved, the associate can go to the next higher ranking supervisor and so forth.

All associates enjoy the same benefits. These include a 401(k) plan, vacation time, sick time, and insurance benefits. In addition, all employees have the same discount card and receive a 10 percent discount on automotive service work performed in the TLE division.

All associates are eligible for storewide awards such as "associate of the month." TLE division associates have received various awards.

The store conducts approximately seven to eight "morale-building" events for associates per year. These include a summer picnic, Thanksgiving and Christmas celebrations and the distribution of free sandwiches during inventory. Store Manager O'Neal testified that TLE associates have attended almost all of the store's morale-building events. All associates participate in the Employer's yearly stakeholder bonus program, which is based on the profitability of the entire store and the number of associates employed in the store.

A yearly budget is generated for the entire store. This budget includes forecasted sales, expenses, wages and total operational costs for the following year. The information utilized to originate this budget is obtained from data in the home office for each division. The staffing, payroll, and schedule for the entire store is derived from the primary budget. Once a month, the

store manager works with the TLE division manager in the drafting of the TLE division's budget.

After the budget is created for the upcoming year, the Employer's computer system automatically calculates the number of hours allotted for the scheduling of employees in each of the store's divisions. The store manager then decides how many hours to allocate each department within each division. Thereafter, the assistant managers and department managers make the schedule on a week-to-week basis for their respective departments.

The store manager is responsible for signing off on these schedules and has the authority to make changes to these schedules.

Inventory for the entire store is performed on an annual basis by an outside service. The date and time for this inventory is set by the corporate office. After the completion of the inventory, an overall store profit-and- loss statement is generated along with a separate division profit-and-loss statement.

The store utilizes the same loss prevention personnel in every division in the store. These individuals are responsible for preventing shoplifting, enforcing safety regulations and investigating any cash shortages that may arise throughout the entire store.

With respect to the merchandising and advertising of products, all of the divisions present their products and advertise them with the same types of signs.

For example, all divisions utilize the same "flags" to promote items. The Employer owns all of the displays that are utilized in the TLE division. The entire store also engages in the cross-merchandising of

products. In this regard, products from varying departments, including products from the TLE division, will be promoted side by side in different areas of the store. In addition, the store advertises products through monthly circulars that go out to customers. Products from all divisions in the store, including the TLE division, are advertised in this circular.

In regard to product returns, these are processed through the customer service counter which is located at the front of the store. The customer service counter handles almost all of the returns that come into the store, including the TLE division's returns. The only exceptions are car batteries, which for safety reasons, are returned directly to the TLE division.

After these returns have been received, the customer service desk decides whether a product can be returned to the sales floor or whether the product is defective and has to be returned to the vendor. If the product is defective, the customer service desk advises a claims associate/office clerical employee and that individual will process the appropriate paperwork so that the product can be returned to the vendor.

The associates in the customer service counter are responsible for the authorization of checks, price adjustments, voids and price overrides throughout the entire store, including the TLE division.⁹

All associates are responsible for collecting items that customers may leave throughout the store ("go-backs"), regardless of the department where these go-backs are found. These are

⁹ The record disclosed that the TLE Division can authorize checks under \$100 without the assistance of a customer service manager.

then taken to the customer service desk and re-distributed in their appropriate areas.

The customer service associate might call an associate from the department where the go-back belongs to pick up the go-

backs, or sometimes an associate will redistribute the go-backs for the entire store.

Customers may purchase items at any of the open cash registers in the store, regardless of where the item originated. Since the TLE division cash registers close 1 hour before the store's front registers, any purchases from the TLE division after its registers are closed are handled by registers in other areas. Alternately, since the crafts department does not have a register, customers with products from that department often finalize their transactions in department 10 of the TLE division. TLE division sales associates ring up products from other departments on a daily basis.

The store also has a voluntary safety committee which is comprised of associates from various departments throughout the store and serves to ensure that the store's safety and policies and procedures are observed. The members of this committee rotate every 6 months to a year. Although the safety committee has had TLE division associates participate in the past, no TLE division associate has participated in the past 6 months.

The store's maintenance employees clean the entire store, including the TLE division. In the TLE division, the maintenance employees clean and wax the floors. There is a key-making machine in the TLE division where all of the store's internal keys are duplicated.

With respect to the TLE division retail associates, the record discloses that the majority of their work time is spent within

their department. Cashiers in the TLE division do not generally provide support on registers in other divisions of the store. However, the record discloses that on various occasions, sales associates in department 10 have assisted customers in other departments and have performed work in other departments. In this regard, the TLE stocker has been assigned to help with the set-up of seasonal projects. In addition, TLE associates Sandra Terry and Tom Meden, on an average of once per week, direct customers from department 10 to other parts of the Store. Terry has also assisted customers in finding product in the crafts department and Meden has mixed paint in the hardware department.

John Humphrey

Department Manager John Humphrey (herein called Humphrey) has been employed by the Employer for approximately 6 ½ years. His current work schedule is from 7:00 a.m. to 3:30 p.m. or 4:00 p.m. His current rate of pay is \$11.35 per hour. Humphrey reports to the TLE division manager.

Humphrey was originally hired as a support manager for the TLE division. He was then reclassified to the department manager position on or about December 2, 2000. At that time he received a 6-percent pay increase.

Humphrey spends the majority of his day in the TLE division. He verifies that the division is stocked, orders merchandise, pulls merchandise from the store room and places it on the sales floor, sets the features on the stock and assures himself that they are correctly priced and flagged. In addition, he walks around department 10 frequently and assists customers. Humphrey also goes to the customer service desk to pick up merchandise that customers have returned and/or to examine a product that a customer wants to return.

He will also often go into department 37 to get information as a result of a customer inquiry.

The record reveals that Humphrey has never hired, fired, suspended, laid off, recalled, promoted, issued a written disciplinary warning, or transferred an employee, nor recommended that any of these actions be taken.¹⁰ The record discloses that although Humphrey has signed employee exit interview forms, it was the TLE division manager who made the decision to discharge the employee. In addition, the record reveals that Humphrey did not participate in the decision to reduce the workforce.

Humphrey testified that while he worked as support manager, he authorized overtime for associates utilizing his own independent judgement;¹¹ he has not authorized overtime for employees since he was reclassified to the position of department manager.¹²

The record reveals that Humphrey has participated in the interviewing of prospective employees when he was a support manager, but that he has not participated in any since he became department manager (although he acknowledged that it is within the scope of his responsibilities). The TLE division has not hired any new employees in either department of the division since Humphrey was reclassified to the department manager position.

The record reveals that since becoming department manager, Humphrey has participated in the hiring process as a "second interviewer." In this capacity, after the applicant meets

¹⁰ In the time that Humphrey has been employed in the store, there have been no layoffs, recalls, promotions or suspensions.

¹¹ The record is silent with respect to the details of this approval of overtime.

¹² The record reveals that within the Store's hierarchy, support managers in other divisions have more authority than department managers.

with an initial screening committee¹³ and fills out an "Orion survey,"¹⁴ Humphrey is given the applicant's completed Orion survey along with any questions that the pre-screening committee or TLE division manager might have concerning the applicant's responses. Humphrey, as the second interviewer, then reviews any responses to the Orion survey with the applicant that the computer and the TLE division manager had signaled as an area that needed explanation. After seeking the applicant's clarifications, Humphrey notes the applicant's response and the applicant's reasoning.

In addition, as a second interviewer, Humphrey notes his comments on whether or not the applicant exhibited the store's set standards for desirable personality traits, such as friendliness and punctuality.

Finally, Humphrey notes whether he believes that the applicant should move on to the next stage of the hiring process. Humphrey then gives these notes along with the Orion survey's clarifications to the TLE division manager.

Store Manager O'Neal testified that if the second interviewer recommends that an applicant proceed to the next stage of the hiring process, either he or his co-manager will interview the applicant a third time.

¹³ The screening committee consists of several associates and managers. These individuals review the prospective employee's application and interview the applicant. Afterwards, they fill out a comments sheet either recommending that an applicant move on to the next phase of the hiring process or rejecting the applicant altogether.

¹⁴ As previously noted, the Orion survey is a character test issued by the Employer. This test allows the store to assess whether or not the applicant has desirable personality traits. After the applicant has completed the survey, it is inputted into a computer system which then signals whether a response needs clarification. ~~that the~~

The final determination is made by O'Neal based on the entire hiring process. Thus, he relies on the comments of the pre-screening committee, the Orion survey, the second interview clarifications to the Orion survey, and his own interview with the applicant.

The record discloses that if the second interviewer does not believe the applicant would make a good employee, the application is ultimately referred to the personnel manager rather than the store manager for the third and final interview. Humphrey has never commented that an employee should not proceed to the next part of the hiring process. Humphrey has only interviewed employees in connection with the Orion survey and has never actually hired employees.

The record discloses that
____Humphrey has never independently completed a performance evaluation for any associate, although he has signed performance evaluations in the past as a witness. The record reveals that Humphrey has signed employee appraisal forms at the direction of various TLE division managers. However, Humphrey did not fill out any appraisals, nor did he discuss employees' work performance with these TLE division managers before they completed the performance reviews.¹⁵

The record reveals that Humphrey has never independently granted any wage increase, nor has he recommended that an employee's wages be raised. The record discloses that Humphrey has signed employee's pay adjustment forms, but the record also discloses that Humphrey provided no input in the decisions to grant any raises. Thus, he was merely asked to sign the form by the

¹⁵ The Employer did not present any of the TLE division managers mentioned on the record and in connection with the performance appraisals that Humphrey signed.

TLE division manager as the determination to raise employee wages was made prior to his signing of the document.

The record reveals that Humphrey does not generally direct employees in the performance of their work. He does not assign any work duties to the cashiers, as they rely on the support manager on duty for their assignments. Humphrey is not responsible for assigning work to the service technicians as this is done by their service manager. With respect to the stocker, Humphrey does assign him work; however, the associates in the division are experienced, so that they generally already know what needs to be done throughout the day as they perform the same duties every day.¹⁶ In this regard, stockers generally know what items need to be stocked just by looking at the sales floor.

Humphrey testified that if an employee were to not follow his directions, he would advise the TLE division manager. However, the record failed to disclose that such recourse has ever been necessary, and the record is silent with respect to whether disciplinary action would result.

With respect to the evaluation of probationary employees, the record disclosed that as a support manager, Humphrey has been involved in the evaluation of probationary employees, both sales associates and service technicians in the TLE division. In certain instances, Humphrey has been asked to confer with the TLE division manager as to whether new associates had satisfactorily

¹⁶ There are two stockers in the division, a day and night stocker. The day stocker, John Moreno, comes in at 4:00 or 5:00 a.m. and leaves at 1:00 p.m. or 2:00 p.m. The night stocker, Clayton Mason, works from 3:00 p.m. to 11:00 p.m. Humphrey's hours only coincide with Mason for about ½ hour each day.

completed their probationary period.¹⁷ Humphrey, however, has never recommended to the TLE division manager that an employee should not be retained. Humphrey testified, however, that since becoming a department manager, he has not had occasion to participate in the evaluation of probationary employees.

The record reveals that the stock is delivered to the store at night. The day stocker retrieves from the stockroom the pallets of freight and places this inventory in the backroom and sales floor. The night stocker then replenishes stock on the sales floor.

Humphrey has the authority to sign time adjustment forms for associates. This is a correction sheet that employees submit if they have clocked in or out incorrectly. The record reveals that other support managers have this authority as well.

When an employee is absent, Humphrey or the TLE division manager or service manager will call an associate to come into the store and fill in for the absent employee. Humphrey chooses to call a particular associate on a random basis and does not go down the list alphabetically.

Humphrey testified that he has never "required" an employee to fill in for another employee. The record discloses that employees have the option of not working when called in to work.

As a support manager, Humphrey has allowed sales associates to leave early. In addition, when service technicians have asked him to leave early, Humphrey has referred them to the service manager for final authorization, but in the absence of another manager, he has the authority to authorize them to leave early. Humphrey testified,

¹⁷ The record is silent concerning the level of involvement that Humphrey had in this process. It did not reveal what types of comments Humphrey made to TLE division manager concerning the new associates nor how much weight these comments were given.

however, that since becoming a department manager, he has not had occasion to grant such a request. With respect to allowing employees to arrive late to work due to personal reasons, Humphrey testified that he did not believe he has ever had such authority. He has never had an associate ask him for permission to arrive to work late due to personal reasons.

While Humphrey also is responsible for training stockers and cashiers, the record discloses that the last stocker that he trained was approximately 6 years ago, and Humphrey has never trained a cashier.

Humphrey is additionally responsible for correcting unsafe working conditions, including spills on the floor and debris. In this regard, the record discloses that Humphrey has corrected similar unsafe conditions in the TLE division. In addition, he has the authority to caution employees to cease unsafe practices. The record reveals, however, that every associate in the store is responsible for correcting unsafe working conditions.

Part of Humphrey's job description as a department manager is to provide "coaching" to employees. Coaching is the store's word for "counseling of an associate," which can include disciplinary counseling. Humphrey testified that while he has coached and recognized associates by complimenting them on their work, and that he has relayed those comments to the TLE division manager in passing, his coaching did not result in any benefits or written commendations.

The record discloses that Humphrey has the authority to grant customers a credit or a reduction on a service if a customer lodges a valid complaint, which he has done from time to time. The record disclosed one instance where a customer complained about the length of time it was taking for an oil change to be performed. As a

result of the complaint, Humphrey offered the customer a free oil change. The record also disclosed that service technicians, without any authorization, are also permitted to offer free oil changes.¹⁸

The record reveals that Humphrey has a key to the TLE division's security office, where automotive stereo equipment is stored. The TLE division manager and support managers also have this key. Humphrey received this key when he was hired by the Employer as a support manager.

In addition, Humphrey has a key to the TLE division cash register and to the TLE division back door. The TLE division manager and support managers have similar keys.

Humphrey participates in weekly department manager meetings, which are conducted by the store manager. Here, the store manager discusses upcoming promotions and store policies. There are no similar meetings for support managers. Humphrey testified that he has not attended any department manager meetings where promotional opportunities or labor relations problems have been discussed.

Humphrey, like the other hourly employees in the store, works overtime hours and is compensated for that overtime work. As is the case with other associates, his overtime work has to be pre-approved by a manager.

Humphrey wears a blue vest like the rest of the retail associates in the store, while the support managers wear regular street clothes.

¹⁸ This discount to customers does not apply to merchandise.

Humphrey is responsible for ordering merchandise for the TLE division through the use of a "Telezon" machine.¹⁹ He knows what to order based on his judgement of the past rate of sale for an item.

With respect to register transactions, if there is an error on the registers, the record discloses that Humphrey can either correct the mistake himself depending on the error, or he may have to call another manager to correct the mistake. For example, if he rings up a product twice, he can delete one of the products, but he does not have the authority to delete an entire transaction. In order to do so, he must call the TLE division manager or one of the support managers. In addition, Humphrey utilizes his register key to correct over-rings and under-rings that cashiers bring to his attention (and which they cannot correct). In these instances, Humphrey attempts to correct the situation by aborting the transaction and allowing the cashier to start over again.

The record also discloses that Humphrey does not schedule employees, nor does he schedule vacations.

In addition, he does not project the budget for the TLE division.

The first issue presented is whether the unit sought by the Petitioner is an appropriate unit for the purposes of collective bargaining. In deciding the appropriateness of a unit, the Board first considers the union's petition and whether that unit is appropriate. P.J. Dick Contracting, 290 NLRB 150 (1988). The Board's task is therefore to consider whether the unit requested is an appropriate one, even though it may not be the most appropriate unit. Black & Decker Mfg. Co., 147 NLRB 825, 828 (1964). If it is appropriate, [the] inquiry ends. If, however, it is inappropriate, the Board will

¹⁹ A "Telezon" machine is a hand-held unit which is connected to the store's main operational system and allows employees to order

scrutinize the Employer's proposals." Dezcon, Inc., 295 NLRB 109, 111 (1989). A petitioner must demonstrate that the employees in the petitioned-for-unit share a sufficient "community of interest" so as to constitute an appropriate bargaining unit. Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971). As enumerated in Kalamazoo Paper Box Corp., 136 NLRB 134 (1962), the factors

determining this community of interest include:

Similarity in methods of work or compensation, similar hours of work, employment benefits, common supervision, similar qualifications, training and skills, similarity in job functions and the location where job duties are performed, the amount of interaction and contact with other employees, integration and interchange of work functions with other employees and the history of bargaining.

In applying the above-enumerated factors to the present case, it is clear that the employees in the petitioned-for-unit share a close community of interest so as to constitute an appropriate unit.

Although the Employer provides employees with common benefits, common overall supervision by the store manager, some centralized personnel functions and there exists a small degree of employee interaction between TLE Division employees and other employees, these factors are insufficient to override the strong community of interest that exists among the employees of the petitioned-for unit.

merchandise and perform price mark-downs or mark-ups.

In the present case, the record reveals that the TLE division's sales associates, greeter, and service technicians have different job duties and engage in entirely different job functions than the rest of the store's associates.²⁰ Further, although the record revealed some interchange between the TLE division's sales associates and the rest of the store's retail associates, this was generally temporary and inconsequential. It is also noted that interchange among associates disclosed in the record was almost exclusively between TLE division sales associates and other sales associates and not service technicians.²¹ Moreover, the fact that TLE sales associates occasionally assist associates in other departments or customers from other areas of the store, does not diminish the community of interest between the TLE sales associates and the service technicians whom the record disclosed have frequent interchange and interaction.

In addition, although the record disclosed two transfers into the TLE service area since the filing of the petition, there were no transfers into that area prior to that time. The testimony revealed that when a service technician is absent, the service area merely absorbs the work caused by this absence and does not bring an associate from another division to cover for that technician.

It is also noted that contrary to other classifications in the store, the service technicians work in a separate and distinct area of the store. While other employees utilize a different restroom inside of the main store, the service technicians

²⁰ Other than having to apply the "Ten Foot Rule" to customers and in general providing great customer service, the record does not disclose how the functions of the service technicians are akin to those of a sales associate.

have their own clean-up room located in the service area due to the nature of the services they provide and the fact that their uniforms get soiled easily.

In addition, the record reveals that the service technicians wear different uniforms than the rest of the employees in the store. Further, they use safety equipment that no other associate is required, or needs, to wear, such as hard-hats and burn sleeves. The tools that service technicians utilize also differ substantially from that of other employees.

Based on the above, and the record as a whole, it is concluded that the petitioned for unit constitutes an appropriate unit.

The Employer argues that the Elsinore facility is a highly integrated and interdependent store. In this regard, it stresses that employees in the petitioned-for unit cannot perform their duties without the operational support provided by the rest of the store's employees. In support of its contention, the Employer cites Sears, Roebuck & Co., 191 NLRB 398 (1971), involving the Sears Santa Rosa facility (herein referred to as the "Santa Rosa store" or "Case"), where only a storewide unit was found to be appropriate. The Employer claims that the Lake Elsinore facility exhibits the same level of integration as the Santa Rosa store.

Despite the Employer's contentions, it is concluded that the present case is not analogous to the situation in the Santa Rosa store. First, in the Santa Rosa case, three different

²¹ The record revealed that the service technicians will work in conjunction with a cart associate to assemble the tire promotion outside of the store twice a year, an event that is sporadic at best.

unions were seeking to represent three different units of employees.²² Thus, the petitioners in that case were seeking to fragment the store, particularly with respect to classifications within same departments. In the present case, the Petitioner seeks only to represent a unit consisting of TLE division employees. In this regard, the Petitioner is not seeking to "carve-out" the TLE sales associates from the TLE service technicians.

Secondly, in the Santa Rosa store, the automotive center did not have a separate manager to oversee its operation. Herein, the record disclosed that the TLE division employees' work is to a significant extent directed by the TLE division manager, department manager, support managers and service manager. Although the Employer maintains that the store manager is the final authority on all issues in the store, the record discloses that the TLE division manager and the rest of his staff provide the day-to-day oversight of the TLE division.²³

In this regard, the TLE division manager and support managers assign daily tasks to the sales associates, while the service manager decides what service orders to give certain service

²² The Machinists Union was seeking to represent a unit of service station employees (five full-time and two part-time installers; excluding the five salesmen and one partsman who also worked in the service station). The Teamsters Union sought to represent a unit consisting of seven warehousemen, two drivers, two helpers, two parts department employees, 18 servicemen, eight clerical employees, five shipping and receiving employees and one clerical employee in the dock area of the retail store. The Retail Clerks Union sought to represent a unit of 160 salesmen, 55 clerical employees and five maintenance employees.

²³ The Employer also argues that the 1 to 1 ½ hours that the store manager spends throughout the day in the TLE division demonstrates the high level of integration within the store. However, the record revealed that the store manager "oversaw" primarily Department 10 of

technicians. The TLE division manager is expected to handle employee grievances that may arise pursuant to the Employer's "open-door" grievance policy. The TLE division manager is also directly responsible for the evaluations and regular monitoring of employees' work performances. Likewise, the TLE division manager is responsible for the scheduling of employees.

Additionally, separate and distinct supervision from that of the store manager is evidenced through the "SWAS" concept, wherein there is a vertical chain of command outside of the store's hierarchy.

Also, the hours of the service station in the Santa Rosa store were the same as the main store's hours. In the present case, the TLE service area maintains different hours of operation than the rest of the store.

Finally, in the Santa Rosa case, there was a considerable amount of interchange among several of the classifications in the petitioned-for units. For example, the installers were required to man the sales floor, as well as engage in several kinds of maintenance work.

Overall, I find the present case to resemble the circumstances of the Board's decision in Sears, Roebuck and Co., 261 NLRB 245 (1982), where, as in the present case, one union sought to represent a unit of auto center employees. The Board noted a high degree of interaction among employees in the automotive center, and a comparatively limited interaction with other store employees. The Board found that the infrequent and temporary assignment to work in other departments, the assistance of customers in other departments and the ringing up of merchandise from other departments had limited impact

the TLE division and did not spend any significant amount of time in the service area of the division.

on the daily activities of the automotive center employees. It is further noted that the Board has found in numerous instances units similar to the present case appropriate for the purposes of collective bargaining. See, Montgomery Ward and Co., 150 NLRB 598 (1964); J.C. Penney Co., 196 NLRB 708 (1972).

The remaining issue is the supervisory status of Department Manager John Humphrey. The Employer argues that he is a supervisor within the meaning of the Act and should therefore be excluded from the unit.

Under Section 2(11) of the Act, a supervisor is any individual with the authority to:

Hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action..

To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11). Rather, possession of any one of them is sufficient to confer supervisory status. Chicago Metallic Corp., 237 NLRB 1677, 1689 (1985). Consistent with the statutory language and the legislative intent, it is well recognized that the disjunctive listing of supervisory indicia in Section 2(11) does not alter the requirement that a supervisor exercise independent judgement in performing the enumerated functions. The exercise of supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not elevate an employee into the supervisory ranks, the test of which must be the significance of the judgment and directions. Opelika Foundry, 281 NLRB 897, 899 (1986). The burden of proving supervisory status rests on the party alleging that such status exists. Tucson Gas & Electric Co.,

241 NLRB 181 (1979). The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. Quadrex Environmental Co., 308 NLRB 101, 102 (1992). Secondary indicia of supervisory status cannot transform an individual without any of the powers enumerated in Section 2(11) into a statutory supervisor. National Crest Nursing Home, 313 NLRB 491, 508,509 (1993).

The record herein establishes that Humphrey primarily performs sales associate work, rather than supervisory tasks. In this regard, he spends the majority of his day in the TLE division assisting customers, stocking the sales floor, ensuring that prices on merchandise are correct and picking up go-backs from the customer service desk.

In addition, there is no evidence that Humphrey possesses any of the primary supervisory indicia outlined in Section 2(11) of the Act, nor that he utilizes any independent judgement or makes recommendations on such actions within the meaning of the Act.

The Employer submits that Humphrey has the authority to recommend that an employee be hired, as he participated in the interviewing process. The record, however, discloses that Humphrey has a limited participation in the procedure. He, in fact, has no independent authority to hire employees on behalf of the Employer. Further, the record establishes that Humphrey's evaluations are reviewed and that the final decision is made by the store manager, which is insufficient to render him a supervisor as defined by the Act. See Ryder Truck Rental, Inc., 326 NLRB 1386, 1387-1388 fn.9 (1998). In this regard, Humphrey only submits the clarifications to the Orion survey as well as his notation of whether the applicant should proceed to the next stage of the hiring process. These comments

are based on the applicant's responses to the items flagged in the Orion survey and any personality traits that would be desirable in a Wal-Mart employee. Thus, the record did not disclose that Humphrey effectively recommends that an employee be hired or not hired.

Further, the testimony is clear that the person who makes the final determination with respect to hiring employees is the store manager as he is the individual who interviews the employee for the third and final time. Although the store manager takes into consideration the second interviewer's clarifications to the Orion survey and his comments regarding the applicant's desirable personality traits, the record revealed that the store manager examines the entire application process before making a final determination. In this regard, the store manager reviews the pre-screening committee's comments and recommendations, the Orion survey, the second interview, and his own interview and observations with the applicant. Thus, while the opinions and comments of various individuals are considered, the store manager independently makes the decision to hire employees after his own final interview.

With respect to performance appraisals, the Board has held that the fact that managers obtain input from others in the department in conducting performance reviews does not confer supervisory status, in the absence of evidence that the input constitutes an effective recommendation for a pay increase, promotion or other reward. Arizona Public Service Co., 310 NLRB 477, 481 (1993); Passavant Health Center, 284 NLRB 887 (1987). In the present case, Humphrey merely signs the appraisal forms. Contrary to the cases cited by the Employer, he does not give any direct input to the TLE division manager nor does he draft the appraisal. Further, the record failed to disclose that he made any

recommendations on how the individuals should be evaluated and whether they should receive a promotion, wage increase or disciplinary action.

The record demonstrates that although Humphrey occasionally assigns tasks to stockers, primarily the day stocker, these assignments are routine in nature. Moreover, the record disclosed that the stockers in the division have set daily duties. The day stocker handles the freight that comes in every morning and the night stocker replenishes what is missing on the sales floor.

In this regard, the Board has held that an employee does not become a supervisor merely because he has greater skills and job responsibilities than fellow employees or because he gives some instructions or minor orders. Byers Engineering Corp., 324 NLRB 740 (1992).

Contrary to the Employer's assertions, Humphrey's attendance at department manager meetings, his approximate \$1.00 more that he earns above the second highest TLE division employee, infrequent training of employees, positive comments to employees concerning their work and signing of time adjustment forms, crediting customers, and having keys to other parts of the store, are at best, secondary indicia of supervisory status. In addition, the fact that Humphrey orders parts and merchandise is insufficient evidence of supervisory status.

The Employer relies on a recent Administrative Law Judges (ALJ) decision, in Wal-Mart Stores, Inc. and United Food and Commercial Workers International Union, Case 16-CA-20578 (February 7, 2001), wherein the ALJ found that the sporting goods department manager at the Wal-Mart Store in question was a supervisor within the meaning of the Act. This case is factually distinguishable in that there was no evidence that Humphrey can or has taken disciplinary actions against

employees. Further, unlike the cases cited therein, the record herein fails to disclose that Humphrey proposes commendations for employees or that he provides yearly evaluations for employees.

Based on the above, and the record as a whole, it is concluded that the Employer has failed to meet its burden that John Humphrey is a supervisor within the meaning of Section 2(11) of the Act. He shall, therefore, be included in the unit.

There are approximately 18 employees in the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period, and their replacements. Those in the military services if the United States may vote if they appear in person at the polls. Ineligible to vote are those employees who have quit or been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by **United Food and Commercial Workers International Union, Local 1167, AFL-CIO, CLC.**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to this election should have access to a list of voters in the unit and their addresses which may be used to communicate with them. Exelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman -Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, two copies of an alphabetized election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994).

In order to be timely files, such list must be received in Region 21, 888 South Figueroa Street, 9th Floor, Los Angeles, California, 90017, on or before April 2, 2001. No extension of time to file the list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement herein imposed.

NOTICE OF POSTING OBLIGATIONS

According to the Board's Rules and Regulations, Section 103.21, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the day of the election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be files. Section 103.20(c) of the Board's Rules and Regulations requires

an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employer from filing objections based on non posting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 1022.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by April 9, 2001.

DATED at Los Angeles, California, this 26th day of March, 2001.

/s/Victoria E, Aguayo
Victoria E. Aguayo
Regional Director, Region 21
National Labor Relation Board

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